STATE OF MICHIGAN

COURT OF APPEALS

LENAWEE COUNTY TREASURER,

Petitioner/Counter-Defendant-Appellee,

v

ESTATE OF WILLIAM McKNIGHT,

Intervening Respondent/Cross-Defendant-Appellant,

and

TODD ALCOCK and ELIZABETH ALCOCK,

Intervening Defendants/Counter-Plaintiffs/Cross-Plaintiffs-Appellees.

UNPUBLISHED
April 26, 2011

No. 296807
Lenawee Circuit Court
LC No. 07-002629-CZ

Before: BECKERING, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

The Estate of William McKnight appeals as of right a February 25, 2010, order awarding the Lenawee County Treasurer attorney fees and costs of $1,218.11 for responding to the estate's petition to set aside a judgment of foreclosure, apparently on the ground that the petition was frivolous under MCL 600.2591(3)(iii). We reverse the award of sanctions.[1]

[1] This Court previously dismissed for lack of jurisdiction the claim of appeal to the extent that it sought to challenge the trial court's February 18, 2010, order denying the estate's petition to set aside the judgment of foreclosure "because the appeal was not timely filed with respect to the judgment of foreclosure and the February 18, 2010 order is not a final order as defined in MCR 7.202(6)." *In re Petition of Lenawee Co Treasurer for Foreclosure*, unpublished order of the Court of Appeals, entered April 8, 2010 (Docket No. 296807). The estate thereafter filed a

The trial court did not identify the basis for its award. The county treasurer sought sanctions under MCR 2.625(A)(2), which incorporates MCL 600.2591, and also MCR 2.114(D) and (E), which concern the effect of a signature of an attorney or party on documents, including pleadings, motions, and other papers. The county treasurer also cited MCR 2.114(F), which refers to MCR 2.625(A)(2). However, the county treasurer did not discuss how these rules applied to the case, either in its brief or at oral argument, other than to assert that the estate's petition to set aside the judgment of foreclosure was "frivolous." Because the trial court did not identify any other basis for its award, it is implicit that it awarded sanctions because it agreed with the county treasurer's position that the estate's petition was frivolous. Cf. *Siecinski v First State Bank of East Detroit*, 209 Mich App 459, 465-466; 531 NW2d 768 (1995).

This Court reviews for clear error a trial court's finding whether a claim is frivolous for the purpose of awarding sanctions. *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 195; 565 NW2d 887 (1997).

MCL 600.2591 states, in pertinent part:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
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> * * *
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> (3) As used in this section:
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> (a) "Frivolous" means that at least 1 of the following conditions is met:
>
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit.

No claim has been made, either below or on appeal, that the estate's petition was filed with a primary purpose to harass, embarrass, or injure another party, or that the estate did not have a reasonable basis for believing that the facts underlying its legal position were true. Instead, the parties focus on whether the estate's legal position was frivolous under MCL 600.2591(3)(iii) because it was "devoid of arguable legal merit."

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delayed application for leave to appeal the February 18, 2010, order, which this Court denied "for lack of merit in the grounds presented." *In re Petition of Lenawee Co Treasurer for Foreclosure*, unpublished order of the Court of Appeals, entered November 10, 2010 (Docket No. 297967). Thus, the validity of the judgment of foreclosure is not at issue in this appeal.

The outcome of a case does not necessarily control the issue of frivolousness. *Louya v William Beaumont Hosp*, 190 Mich App 151, 164; 475 NW2d 434 (1991). As explained in *Jerico Constr, Inc v Quadrants, Inc*, 257 Mich App 22, 36; 666 NW2d 310 (2003), "[t]he determination whether a claim or defense is frivolous must be based on the circumstances at the time it was asserted." Even where, at the outset of the litigation, an attorney doubts the possibility of success on the merits of a case, that fact does not necessarily mean that the claim is frivolous. *Louya*, 190 Mich App at 162. The statute should not be construed to "penalize[] a party whose claim initially appears viable but later becomes unpersuasive." *Id*. at 163. "'Not every error in legal analysis constitutes a frivolous position.'" *Jerico Constr, Inc*, 257 Mich App at 36, quoting *Kitchen v Kitchen*, 465 Mich 654, 663; 641 NW2d 245 (2002).

To prevail in its effort to set aside the judgment of foreclosure, the estate needed to show that the county treasurer failed to provide constitutionally adequate notice. See *In re Petition by Treasurer of Wayne Co for Foreclosure*, 478 Mich 1, 10-11; 732 NW2d 458 (2007). Due process does not require that a property owner receive actual notice before the government takes the property. *Id*. at 9. "[D]ue process requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Furthermore, when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id*. (citations and internal quotation marks omitted). The determination whether the notice provided by the government comports with due process depends on the facts of the particular case, and "[the] notice that is required will vary with [the] circumstances and conditions." *Sidun v Wayne Co Treasurer*, 481 Mich 503, 511; 751 NW2d 453 (2008).

In this case, the personal representative for the estate sought to set aside the tax foreclosure and treasurer's deed on the basis that the county treasurer failed to comply with the notice requirements under MCL 211.1 *et seq.*, and failed to comply with minimal requirements of due process. According to the allegations and documentation attached to the petition, a 1995 warranty deed listed the decedent's address on Springhill Street in Inkster, Michigan, but the county treasurer did not mail notices to that address. The county treasurer unsuccessfully attempted personal service at the property on February 1, 2008, and purportedly placed documents in a conspicuous manner on the property, which it determined was vacant. It also sent notice via certified mail to the decedent at an address in Toledo, Ohio, but the mail was returned as unclaimed. In March 2008, it sent a supplemental notice to the same address, but directed it to the decedent, "c/o Dorothy Mills." Although Mills signed for it, she was not the personal representative for the estate and there was no document or other court order giving her legal authority to act on behalf of or to accept service for the decedent or his estate. The estate's personal representative, Walter Sakowski, had submitted a change of address form for the decedent's Inkster address, so that if the county treasurer had mailed notices to that address, which was listed on the deed of record, Sakowski would have received them. The estate contended that because the county treasurer failed to send the notice to the address on the deed, it failed to send notice to the address reasonably calculated to apprise the owners of the foreclosure proceedings. The estate cited the Due Process Clause, MCL 211.78i(2), and *Sidun*.

The county treasurer admitted the majority of the factual allegations in its answer, but asserted that the Ohio address was the "only then known address" of the decedent or any

representative. At the time the parties filed their motions for summary disposition with respect to the validity of the judgment of foreclosure, a link had been uncovered between the property and the Ohio address. In June 2006, the county treasurer sent a notice of delinquent property taxes for the 2005 tax year to the decedent, "c/o Dorothy Mills" at the Ohio address. On November 8, 2006, Evelyn Craig, who was the personal representative for the estate at the time, paid the delinquent taxes for 2004. The receipt for the 2004 taxes showed the Ohio address.

In claiming that the county treasurer's failure to send notice to the address on the deed was critical, the estate primarily relied on *Sidun*, in which the county treasurer's failure to send notice to an address on the deed was critical to the Court's determination that the notice provided in that case was constitutionally deficient, because notice was not sent to an "address reasonably calculated to reach the person entitled to notice." *Sidun*, 481 Mich at 514 (internal quotation marks and citation omitted). The facts of this case differ from *Sidun* in certain respects. For example, this case does not involve multiple owners. However, the cases are similar in that the treasurer sent notices to the address on file with the assessor, but did not send notice to the address that was listed on the deed of record. Here, when the Ohio mailing was returned as unclaimed, the county treasurer did not simply post and publish in the paper, as in *Sidun*. The treasurer sent a second mailing to the same address and added Mills's name, but Mills was one of several heirs and she was not and had never been the personal representative for the estate. In fact, the county treasurer and the actual personal representative, Sakowski, had several contacts about the property as early as February 2007, although the record is unclear at which point the county treasurer was informed that Sakowski was the personal representative.

However, the issue in this appeal is not whether the notice was constitutionally deficient, but only whether, based on the circumstances as they appeared at the time the estate filed its petition, its position was devoid of arguable legal merit. The estate was aware that the county treasurer had failed to send notice to the address listed for the owner on the deed and instead sent notices to an address in Ohio to an heir who had no legal authority to act for the estate. Even though the estate did not ultimately prevail in its attempt to set aside the judgment of foreclosure, under the facts presented, and in light of *Sidun*, the estate's position that the notice was constitutionally deficient was not devoid of arguable legal merit. We conclude that the trial court's award of sanctions based on its implicit finding that the petition was frivolous is clearly erroneous. Accordingly, we reverse the award of sanctions.

Reversed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly